Connecticut River and on the west side by railroad tracks and other property. *Id.* The Connecticut River in this area contains valuable fisheries and is a prime recreational resource. Joint Appendix, Second Circuit, at 85 (hereinafter, "JA-xxx").

a. *The Buffer Zone Condition.* In 1997, GMRC sought an Act 250 permit to construct a 20-foot by 30-foot office building and to operate a "forest products distribution yard" at the Riverside site.[1] App. 18a. In the permit application, GMRC proposed a 75-foot buffer zone along the Connecticut River to satisfy environmental criteria under Act 250, Vt. Stat. Ann. tit. 10, §§ 6086(a)(1)(E) & (F) (streams and shorelines). App. 4a. Because riparian buffers play a crucial role in protecting rivers such as the Connecticut (JA-089), the Vermont Agency of Natural Resources recommended that the buffer zone be enlarged from 75 to 100 feet. App. 4a.

On November 12, 1997, the District #2 Environmental Commission, which is the state authority that oversees projects in the Rockingham area, issued Land Use Permit #2W0038-2 (the "Dash Two" permit). App. 4a. Condition 14 of the permit required:

> The permittees shall maintain a 100-foot undisturbed, naturally vegetated buffer strip with no mowing or cutting of vegetation between the top of the bank of the Connecticut River and any disturbed areas.

App. 18a.

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[1] GMRC did not initially dispute Act 250's pre-construction permitting requirement.

b. *The Salt Shed Permit.* In the spring of 1998, GMRC sought an amendment to its Act 250 permit, called the "Dash Three" permit application, to construct a 100-foot by 275-foot salt storage shed. App. 5a. The district environmental commission issued the Dash Three permit on January 13, 1999.

In October 1999, GMRC sought another amendment, the "Dash Three-B" permit application, to modify the size, type, color and location of the salt storage building. App. 5a. In November 1999, GMRC began construction of the modified salt storage shed without having obtained a final Dash Three-B permit. *Id.*

In January and February of 2000, the State issued two separate notices of violation to GMRC for various Act 250 violations at the Riverside site, including the construction of the unapproved salt shed and the storage of materials within the 100-foot buffer zone.[2] App. 5a.

4. Proceedings Below

a. On June 6, 2001, GMRC filed a complaint in federal district court where it admitted to various Act 250 violations, but claimed that the ICCTA preempted enforcement of those conditions.[3] App. 16a. GMRC also alleged that, as a railroad, it did not need to obtain an Act 250 permit for future construction, such as a proposed cement facility at the Riverside site, because any attempt by the State to require the railroad to obtain pre-construction permits was preempted by federal law. *Id.*

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[2] There is no dispute in this case that GMRC failed to maintain the buffer zone or that it constructed a salt shed without an approved permit.

[3] On June 5, 2001, GMRC filed a similar petition to institute declaratory proceedings before the STB, which denied the petition on May 24, 2002. App. 5a-6a.

In a motion to dismiss filed on July 17, 2001, the State argued that Act 250 is not preempted on its face by Section 10501(b) and that Act 250 has only an incidental impact on the economic activities of GMRC. App. 16a.

b. The District Court granted in part, and denied in part, the State's motion to dismiss: "[T]o the extent the Defendants ask the Court to dismiss Green Mountain's claim that the ICCTA preempts Act 250 under all circumstances, the motion is granted. *Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the ICCTA.*" JA-020 (District Court's Ruling on Pending Motions, Sept. 26, 2001) (emphasis added).

On July 15, 2003, the State filed a motion for summary judgment, and on August 22, 2003, GMRC filed a cross-motion for summary judgment. The State restated its argument that Section 10501(b) does not preempt Act 250 in this case because Act 250 does not unduly burden the railroad.

In a decision dated December 15, 2003, the District Court contradicted its earlier order and held that the State "may not apply a law like Act 250 so as to require pre-construction approval and permitting." App. 28a. It granted GMRC's cross-motion for summary judgment and denied the State's motion for summary judgment. App. 32a. The State appealed.

c. The Second Circuit affirmed on April 14, 2005, stating that the ICCTA "expressly preempts 'remedies provided under Federal and State law.'" App. 2a. It further found that the plain language of Section 10501 "reflects clear congressional intent to preempt state and local regulation of integral rail facilities." App. 15a.

The court held that "the permitting process itself" was preempted as applied to railroads because "the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulations that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary ruling of a state or local agency." App. 11a.

The court rejected the State's arguments that Act 250 is not preempted on its face and that the court should assess the actual impact of any conditions imposed. App. 11a. It held, instead, that preemption applied even if there were "permit applications affecting railroad facilities that could be promptly approved without the slightest imposition on rail operations." *Id.* The court therefore found it unnecessary to "conduct a fact-based inquiry weighing the economic impact of Act 250's permitting process upon Green Mountain." App. 15a.

It likewise disagreed that only *economic* regulations – *i.e.*, direct economic regulations or those that have a substantial economic impact – are preempted by the ICCTA. App. 13a. The court found the distinction "not useful" because the permitting process "necessarily interferes" with GMRC's ability to construct facilities and conduct economic activities. App. 13a-14a.

Finally, the court was unmoved by the State's argument that the district court's decision leads to illogical consequences. The State argued that because the activities at issue are ancillary projects and not under the STB's regulatory authority, they would be subject to no environmental review whatsoever if Act 250 were preempted. Despite this gap in regulatory coverage, the Court held that Act 250 was *per se* preempted.

REASONS FOR GRANTING THE PETITION

Since its enactment over ten years ago, federal and state courts have repeatedly disagreed over the preemptive force of Section 10501(b) of the ICCTA as it applies to railroad operations in general, and also as it applies to ancillary projects – which are not under federal regulatory control. In this case, the Second Circuit took an expansive view that stretches the preemptive scope of the ICCTA beyond its breaking point. Unlike most other courts, it held that pre-construction permitting programs are *per se* preempted.

This Court should grant certiorari for three reasons. First, this Court should resolve the conflict among the courts, including a direct split between the Vermont Supreme Court and its corresponding circuit court of appeals, on the preemptive scope of Section 10501(b). Second, this is a recurring issue that goes to the heart of federal-state relations and that has been fully developed by the lower courts. Third, the Second Circuit misapplied this Court's precedents and erred when it held that railroads are completely exempt from pre-construction permitting programs.

I. The Second Circuit's Decision Is In Sharp Conflict With Decisions Of Other Courts Of Appeals And State Supreme Courts.

Courts across the country are divided over the level of preemption intended by Section 10501(b).[4] The tests

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[4] The federal district court for the District of Columbia in *District of Columbia v. 109,205.5 Square Feet of Land*, 2005 WL 975745 at *3 (D.D.C. Apr. 21, 2005), recently recognized the conflict among the courts on the preemptive breadth of Section 10501(b). It stated:

applied by the courts to determine preemption demonstrate a fundamental disagreement over how to interpret the plain language of Section 10501(b), and, more specifically, what effect to give the phrase "with respect to the regulation of rail transportation" as that phrase is used in that section. The courts have applied four distinct and conflicting tests when determining the scope of preemption of Section 10501(b).

First, the Second Circuit in this case interpreted Section 10501(b) to preempt all pre-construction permitting programs as applied to railroads because they "necessarily interfere" with a railroad's ability to construct facilities and conduct economic activities.[5] App. 14a (internal quotations omitted). Relying extensively on the Ninth Circuit's ruling in *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999), the Second Circuit construed the section expansively, finding "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad

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Courts have been split on the broadness of preemption under ICCTA; some have held it preempts all state efforts, *City of Auburn* [*v. United States*], 154 F.3d [1025,] 1029-1030 [9th Cir. 1998]; *Wis*[*consin*] *Cen*[*tral*] *Ltd.* [*v. City of Marshfield*], 160 F. Supp. 2d [1009,] 1013 [W.D. Wis. 2000], and others have held it applies only to the regulation of rail transportation. *Iowa, Chi. & E. R.R. v. Wash*[*ington*]*. County*, 584 F.3d 557, 561 (8th Cir. 2004); *Fla. E. Coast R.R. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001).

Presumably unaware of the Second Circuit's decision seven days earlier, the district court failed to cite the opinion below.

[5] The STB, which filed an Amicus Brief in the case below, also claims that pre-construction permitting requirements are entirely preempted.

operations."[6] App. 15a. Thus, pursuant to the decision below, all state and local pre-construction permitting processes are completely preempted regardless of whether they delay, interfere, or otherwise impose *any* burden on railroad operations.[7]

Second, the Vermont Supreme Court, in direct conflict with the decision below, has held that pre-construction permitting programs are not absolutely preempted. Instead, the court has required examination of permit conditions to determine whether they interfere with railroad operations.

Third, the Eleventh Circuit and the Alaska Supreme Court have similarly rejected the Second Circuit's broad view of preemption. These courts have ruled that Section 10501(b) does not preempt regulations that have only a minimal or remote impact on rail transportation.

Fourth, the Eighth Circuit and, most recently, the North Dakota Supreme Court, have looked to whether the ICCTA addressed the same issue as the state regulation in question. These courts have found no preemption where the ICCTA does not *specifically* regulate the matter at issue.

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[6] The Second Circuit's reliance on *City of Auburn*, however, was misplaced because the Ninth Circuit's ruling turned on the presence of an additional and broader preemption provision of the ICCTA that is not at issue here.

[7] Although not reviewing a pre-construction permitting program, the Fifth Circuit has also taken a broad view of preemption under Section 10501(b). *See Friberg v. Kansas City Southern Railway*, 267 F.3d 439 (5th Cir. 2001).

A. The Decision Below Conflicts With A Decision Of The Vermont Supreme Court.

The Vermont Supreme Court's holding in *In re Appeal of Vermont Railway*, 769 A.2d 648 (Vt. 2000), directly conflicts with the decision below. Despite examining a very similar land use scheme, the Vermont Supreme Court rejected the notion that Section 10501(b) amounts to a *per se* bar to pre-construction permitting requirements.

In *Vermont Railway*, an affiliate of GMRC, Vermont Railway, appealed various permit conditions imposed by the City of Burlington, Vermont, in connection with a facility that Vermont Railway operated. *Id.* at 651. Some of these conditions included requirements relating to the proposed expansion and use of a salt shed at that facility. *Id.* The railroad claimed that Burlington's zoning ordinances were "preempted entirely" by Section 10501(b). *Id.* at 650.

The Vermont Supreme Court refused to find that Section 10501(b) preempted the imposition of the pre-construction permitting program. *Id.* at 654. The court, citing the STB's decision in *King County, WA, Petition for Declaratory Order*, S.T.B. Finance Docket No. 32974, 1996 WL 545598 at *4 (I.C.C.) (September 25, 1996), recognized that "the ICCTA does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads."[6] 769 A.2d at 653. The court concluded that this included the power to protect the environment. *Id.* at 655 (upholding

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[6] Thus, the STB has acknowledged that not *all* state and local regulation is preempted entirely by Section 10501(b). It appears, however, to have drawn a distinction with pre-construction permitting programs. *See supra* note 5.

conditions that were "designed to avert potential contamination from the salt shed").

The court held that "the proper approach" under Section 10501(b) is to determine whether the permit conditions "stood as an obstacle to the goals of the ICCTA." *Id.* at 655. Only if those conditions "interfere[d] with *railway* operations" would they be preempted. *Id.* (emphasis in original); *contra GMRC*, App. 9a (pre-clearance requirements are preempted because they "unduly interfere with interstate commerce"). The Vermont Supreme Court explicitly rejected the railroad's argument that any permit condition "*necessarily* has an economic impact on its railway operations such that it is preempted." 769 A.2d at 654 (emphasis in original).

In reaching its contrary position that pre-construction permitting programs are *per-se* preempted, the Second Circuit relied upon three factors: [1] "the railroad is restrained from development until a permit is issued; [2] the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and [3] the issuance of the permit awaits and depends upon the discretionary ruling of a state or local agency." App. 11a.

Yet, Burlington's Zoning Ordinances ("BZO"), which were at issue in *Vermont Railway*, share these same characteristics. Both Act 250 and Burlington's Zoning Ordinances impose pre-construction permitting requirements. BZO § 4.1.3 ("No land development may be commenced within Burlington without a zoning permit"); Act 250, Vt. Stat. Ann. tit. 10, § 6081(a) ("No person shall . . . commence development without a permit"). Both have criteria to help guide applicants and reviewing agencies, but there is no ability to assure that a permit

will be issued for certain projects. BZO, § 7.1.6 (development board guided by standards "in conducting its review and imposing conditions and safeguards"); Vt. Stat. Ann. tit. 10, § 6086 (conditions and criteria for granting permits). Both give the permitting authority discretion to determine whether a project complies with certain criteria. BZO § 13.1.6(a) (board required to find that major impact developments will "not result in undue water, air or noise pollution"); Vt. Stat. Ann. tit. 10, § 6086(a)(1) (commission must find that the development "will not result in undue water or air pollution").

Consequently, the division between the Second Circuit and the Vermont Supreme Court could not be more stark. Reviewing virtually identical pre-construction permitting schemes, the Second Circuit held that these programs are automatically preempted, while the Vermont Supreme Court held that the permit conditions imposed must be evaluated to see whether they interfere with railroad operations. Whether such pre-construction permitting programs are preempted under Section 10501(b) thus depends entirely on which court heard the case. The ruling of the Second Circuit and that of the Vermont Supreme Court cannot be reconciled. Such a conflict requires resolution by this Court.

B. The Decision Below Conflicts With Decisions Of The Eleventh Circuit And The Alaska Supreme Court.

The Second Circuit's decision also conflicts with the Eleventh Circuit's decision in *Florida East Coast Railway v. City of West Palm Beach*, 266 F.3d 1324, 1339 (11th Cir. 2001), and the Alaska Supreme Court's decision in *Native Village of Eklutna v. Alaska R.R.*, 87 P.3d 41, 57 (Alaska 2004).

1. *Florida East Coast Railway v. City of West Palm Beach*

At issue in *Florida East Coast Railway* was whether Section 10501(b) preempted the zoning ordinances of West Palm Beach. The Eleventh Circuit found that the plain language of Section 10501(b) did not reflect broad congressional intent to preempt all local regulation of rail transportation. 266 F.3d at 1330-31; *contra GMRC*, App. 15a ("the plain language of Section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities"). Rather, the court determined that the phrase "with respect to regulation of rail transportation" placed express limitations on the scope of preemption of Section 10501(b). 266 F.3d at 1331. The Eleventh Circuit ruled that Congress had "narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' *i.e.*, those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation."[9] *Id.* (citations omitted).

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[9] Numerous state courts have similarly found no preemption under Section 10501(b) where regulations impose only incidental burdens on railroads. *Jones v. Union Pac. R.R.*, 94 Cal. Rptr. 2d 661, 666-67 (Cal. Ct. App. 2000) (noting "[s]tate and local regulation of Union Pacific's trains is permissible if it does not interfere with Union Pacific's interstate rail operations"); *Soo Line R.R. v. City of Minneapolis*, 625 N.W.2d 834, 836 (Minn. Ct. App. 2001) (designation of roundhouse for local heritage preservation was not preempted by ICCTA because designation did not interfere with any plan of railway to use the roundhouse); *State ex rel. Oklahoma Corp. Comm'n v. Burlington N. and Santa Fe Railway*, 24 P.3d 368, 371 (Okla. Ct. App. 2000) (statute requiring railroads to construct fences along railway rights-of-way was not preempted by ICCTA).

Even though the application of the zoning regulations might not be "optimally efficient for [the railroad's] operations," the court concluded, the "requirements do not impede the interstate functioning of the railroad industry" and could not be considered the "regulation of rail transportation" under Section 10501(b). *Id.* at 1339; *contra GMRC*, App. 15a (the court "need not conduct a fact-based inquiry weighing the economic impact of Act 250's permitting process upon Green Mountain").

The decision of the Eleventh Circuit directly conflicts with the ruling below in two key respects. First, the Eleventh Circuit's narrow interpretation of the plain language of Section 10501(b) is diametrically opposed to the Second Circuit's broad view. Second, the Eleventh's Circuit focus on the *impact* of the regulation in question diverges from the Second Circuit's facial preemption analysis.

2. *Native Village of Eklutna v. Alaska R.R.*

The Alaska Supreme Court's decision in *Native Village of Eklutna v. Alaska R.R.* also conflicts with the Second Circuit's decision as to whether Section 10501(b) completely preempts pre-construction permitting programs.

In *Native Village of Eklutna*, the Alaska Railroad Corporation began operation of a quarry on culturally significant land near Anchorage, Alaska. 87 P.3d at 43-44. Eklutna, joined by Anchorage, brought suit to enjoin the railroad from operating the quarry without a conditional use permit. *Id.* The railroad argued that it was not required to obtain a conditional use permit because Section 10501(b) preempted the ordinances with respect to railroad property. *Id.* at 56.

Like the Eleventh Circuit, the Alaska Supreme Court looked to whether the zoning ordinances had "more than [an] incidental impact on [the railroad's] operations." 87 P.3d at 57. In finding that the regulations and the conditional use permit requirement were not preempted, the court recognized that "Congress's focus on *economic* regulation makes clear that it had no intention of preempting all state or local regulation that touches railroads in any way."[10] *Id.* (emphasis added). The Alaska Supreme Court stated:

> ICCTA's preemption is aimed at improving the "nationwide efficiency of the railroad industry," not at stopping all regulation that "prevents an individual firm from maximizing its profits." Local regulation may bring some hardship or inconvenience to a railroad without causing the sort of economic impact that would trigger preemption.

Id. (footnote omitted); *contra GMRC*, App. 14a (permitting process "necessarily interferes with Green Mountain's ability to construct facilities and conduct economic activities") (internal quotations omitted).

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[10] Many courts have recognized that Congress's purpose in enacting the ICCTA was to preempt only the economic regulation of railroads by States – not all regulation relating to railroads. *See, e.g., CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 658 (E.D. Mich. 2000) (discussing findings of several courts that have found that the ICCTA "preempts state law regulation of railroads in an economic sense"), *aff'd on other grounds*, 283 F.3d 812 (6th Cir. 2002); *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1296 (D. Mont. 1997) (holding that the "statutory language and accompanying legislative record [of the ICCTA] evidence Congress' clear and manifest intent to occupy the entire field of economic regulation of railroad transportation").

Finally, the Alaska Supreme Court acknowledged that requiring the railroad to get a conditional use permit "will at least delay the operation of the [project] by the time needed for the Railroad to obtain a conditional use permit, and may bar the Railroad's use of the land altogether, if the permit is denied." 87 P.3d at 57 (quoting *Vermont Railway*, 769 A.2d at 654). It noted that "[w]hether this amounts to undue interference with the Railroad's operation is a 'fact-bound determination.'" *Id.*

Contrary to the reasoning of the Second Circuit, the Alaska Supreme Court found such factors insufficient to require *per se* preemption. *Contra GMRC*, App. 9a-10a, 15a (permitting process preempted because "it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely" and the court "need not conduct a fact-based inquiry weighing the economic impact of Act 250's permitting process upon Green Mountain").

Therefore, the test applied by both the Eleventh Circuit and the Alaska Supreme Court, which looks to the regulation's effect on rail transportation, is in conflict with the Second Circuit's broad view of both the plain language and the preemptive scope of Section 10501(b).

C. The Decision Below Conflicts With Decisions Of The Eighth Circuit And The North Dakota Supreme Court.

The Second Circuit's decision is also incompatible with the Eighth Circuit's ruling in *Iowa, Chicago & Eastern R.R. v. Washington County*, 384 F.3d 557, 561 (8th Cir. 2004), and the North Dakota Supreme Court's ruling in *Home of Economy v. Burlington Northern Santa Fe R.R.*, 694 N.W.2d 840, 846-47 (N.D. 2005). Under the analysis of these courts, preemption is not required under Section

10501(b) unless the ICCTA specifically addresses the same issue as the state regulation in question.

1. *Iowa, Chicago & Eastern R.R. v. Washington County*

In *Iowa, Chicago & Eastern R.R.*, Washington County, Iowa petitioned the Iowa Department of Transportation for a ruling that the railroad must pay to replace or repair four "severely deficient" railroad bridges pursuant to state statutory law. 384 F.3d at 558. The railroad then sought a declaratory judgment that the Iowa statute was preempted by the ICCTA. *Id.*

In analyzing the preemptive scope of Section 10501(b), the Eighth Circuit concluded that because the ICCTA did not address the repair and replacement of railway-highway bridges, "[i]ts silence cannot reflect the requisite 'clear and manifest purpose of Congress' to preempt traditional state regulation" of this kind. *Id.* at 561 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). That finding was reinforced by the long-time federal-state partnership addressing rail safety in the Federal Rail Safety Act and also by the "traditional state regulation of public roads and bridges that Congress has encouraged in numerous other statutes." *Id.* The court explicitly rejected the railroad's "broad argument that the ICCTA preempted *this type* of state regulation of railroad 'facilities.'" *Id.* (emphasis in original).

2. *Home of Economy v. Burlington Northern Santa Fe R.R.*

Similarly, in *Home of Economy v. Burlington Northern Santa Fe R.R.*, which was decided on April 6, 2005, a landowner sued a railroad claiming that he had a common-law right to have the railroad re-open a "grade crossing" to allow him access to his property. 694 N.W.2d

840-41. The railroad claimed such common-law actions were preempted by the ICCTA. The North Dakota Supreme Court reviewed Section 10501(b) and found, like the Eighth Circuit, that it preempted only matters that were specifically addressed in the ICCTA. The court concluded that Section 10501(b) did not preempt the landowner's common-law suit because the ICCTA did not "explicitly deal with grade crossings." *Id.* at 844. On the contrary, the court recognized that the states possess "traditional authority regarding grade crossings." *Id.* at 846.

The test applied by the Eighth Circuit and the North Dakota Supreme Court to determine preemption conflicts with the decision below. These courts took a narrow view and looked to whether the ICCTA *specifically* addressed the state regulation in question, while the Second Circuit took an expansive view, finding Section 10501(b) demonstrates "Congress's intent to preempt state regulatory authority over railroad operations" – regardless of whether the ICCTA addresses the exact issue in question. App. 15a.

In sum, the preemptive scope of Section 10501(b) has greatly divided state and federal courts of this country. This Court's review is necessary to resolve this conflict among the courts.

II. This Court Should Resolve A Recurring Issue Of National Import That Has Been Fully Developed By The Lower Courts.

This case involves an important and well-developed issue of federalism that should be determined by this Court. The decision below severely eviscerates state and local authorities' historic police powers, such as enforcing land use, zoning and environmental regulations, as they

are applied to railroads. In addition, this is a recurring issue that has been subject to ample analyses by the lower courts so that no further review is necessary before this Court rules on the matter.

A. This Is An Issue Of Exceptional Importance That Goes To The Heart Of Federal-State Relations.

By holding that the ICCTA displaces all state and local land use and environmental protections that operate through pre-construction permit programs, the Second Circuit has dealt a crippling blow to the ability of states and localities to protect the environment and to control development. Although the Second Circuit suggested that not all regulations are preempted, the remaining laws do not protect these areas of concern. *See GMRC*, App. 10a (finding that railroads are subject to some local regulation such as electrical, plumbing and fire codes).

Like Vermont's use of Act 250, local authorities traditionally regulate land use and protect the environment using their own zoning ordinances. Although municipalities may call the permitting schemes by different names, including "variances," "conditional use permits," and "non-conforming use permits," most municipalities have some type of pre-clearance requirement for commercial projects. Because most permitting programs require site-plan or project review before development, they would likely be preempted under the Second Circuit's sweeping decision.

Such land use regulations play a significant role in protecting the nation's natural resources. Both Congress and this Court have recognized the states' primary role in regulating land use and preserving the environment. *See, e.g., Solid Waste Agency of Northern Cook County v.*

United States Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (the states, not the federal government, exercise "traditional and primary power over land and water use").

Furthermore, state and local laws protect numerous interests that are not directly regulated by federal law, such as preservation of wildlife habitat and natural areas and protection of agricultural soils. *See* Vt. Stat. Ann. tit. 10, § 6086(a)(8) & (9). Eliminating Act 250 and similar local regulations leaves these interests entirely unprotected. Although critically important, federal environmental laws are not intended to, and cannot, substitute for comprehensive state regulation like Act 250 and other permit processes.

Moreover, the Second Circuit's decision produces the illogical result that these types of permitting programs are preempted regardless of what railroad projects are at issue. Thus, a railroad can claim that virtually *any* project tangentially related to rail transportation is exempt from regulation. And, as demonstrated by this case, this means there would be no environmental review – federal, state or local – over many "ancillary" projects where the STB has jurisdiction, but no regulatory authority. *See Appeal of Vermont Railway*, 769 A.2d at 653 n.* (citing STB acknowledgment that it has only limited regulatory authority). For example, under the Second Circuit's decision, if a railroad wanted to operate and use a solid waste landfill, or a rock quarry, *see, e.g., Native Village of Eklutna*, 87 P.3d at 56-57, *supra* pp. 17-19, at the terminus of or along side a rail line, it would evade all federal, state and local environmental permitting requirements. Congress could not have intended to exempt these "ancillary" projects from all environmental review, while requiring "core" rail

transportation projects to be reviewed by the STB under the National Environmental Policy Act. 42 U.S.C. § 4332(2)(C); 49 C.F.R. § 1105.6.

Nothing in the language or history of the ICCTA shows that Congress intended to completely displace historic state police powers that may only touch upon rail transportation. Environmental regulation by state and local authorities for projects outside federal regulatory control is entirely consistent with the federal-state partnership in environmental protection, with the states' historic power to regulate in this area, and with the goals of the ICCTA.

B. This Question Will Continue To Challenge The Lower Courts And They Have Fully Developed The Issue.

The Ninth Circuit in *City of Auburn v. United States* was the first circuit court of appeals to review the pre-emptive scope of the ICCTA. In 1999, the United States - in its brief in opposition to granting certiorari in *City of Auburn*, wrote that "the administrative and judicial process of construing the ICCTA and its effect on state and local regulation has only recently begun," and that "it would be premature for this Court to review questions about the ICCTA's preemptive scope before the Board and the lower courts have had the opportunity to consider the preemptive question in a variety of concrete factual settings." Brief for the Federal Respondents in Opposition to Certiorari at 11, No. 98-1511, *City of Auburn v. United States.*

Courts have now had that opportunity. As recognized by the North Dakota Supreme Court in *Home of Economy*, some courts have broadly construed Congress's preemption language in Section 10501(b) and concluded

that it preempted state or local laws. *See* 694 N.W.2d at 844 (citing 9 cases). Other courts have narrowly construed the section and have concluded that it did not preempt state or local laws. *See id.* at 844-45 (citing 6 cases). The matter has been fully vetted by the courts of this nation.

Given the continued importance of this issue, the divergent views of all these courts, and the impact of the Second Circuit's far-reaching decision, it is now time for this Court to provide guidance on this issue.

III. The Second Circuit Misapplied This Court's Precedents And Reached The Wrong Result.

This Court's preemption analysis is well established. The ultimate goal is to ascertain Congress's intent in crafting a preemption provision. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("purpose of Congress is the ultimate touchstone" in every preemption case). To determine that purpose, this Court has instructed that the language of the statute, the statutory scheme, and the legislative history should be examined. In areas where states have traditionally exercised their police powers, even greater care must be taken to assure that preemption goes no further than Congress intended. Here, the Second Circuit's decision incorrectly analyzes each of the above factors and arrives at a result that can not be squared with prior decisions of this Court.

The Second Circuit misread the plain language of Section 10501(b), and erred by not giving effect to every clause and word of the statute. *Bennett v. Spear*, 520 U.S. 154, 173 (1997). Although the Second Circuit purported to apply a plain language analysis, the court broadly, and inaccurately, stated that the ICCTA "expressly preempts 'remedies provided under Federal and State

law.'"[11] App. 2a. The actual wording of Section 10501(b), however, makes clear that only the remedies set out in Part A are exclusive. App. 34a (42 U.S.C. § 10501(b)) (remedies "provided in this part . . . are exclusive"); *c.f., Cipollone v. Liggett Group, Inc.*, 505 U.S. 505, 517 (1992) (Congress's "enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted").

In addition, Section 10501(b) contains additional limiting language overlooked by the Second Circuit. Congress made the remedies in Part A exclusive, but only "with respect to *regulation of* rail transportation." App. 34a (42 U.S.C. § 10501(b)) (emphasis added). Congress's choice to include this language demonstrates its intent to preempt only state regulation that could be considered "regulation of rail transportation." The Second Circuit's failure to appreciate the significance of this phrase, which acts to restrict the preemptive scope of Section 10501(b), further undermines the court's legal analysis. *See, e.g., Florida East Coast Railway*, 266 F.3d at 1331 (phrase "with respect to regulation of rail transportation" places express limitations on the scope of preemption under Section 10501(b)).

The Second Circuit also should have considered Section 10501(b) in *pari materia* with other sections in the ICCTA. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Other preemption provisions found in Part A of title 49 severely undercut the Second

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[11] The court also erred when it stated that the plain language gave the STB "wide authority" over the facilities at issue in this case. App. 7a. Although the STB may have jurisdiction, it does not have regulatory power over the projects. *See supra* p. 4.

Circuit's broad interpretation of Section 10501(b). For example, Section 11501, entitled "tax discrimination against rail transportation property," states:

> The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them.

App. 36a (49 U.S.C. § 11501(b)).

This provision would be entirely unnecessary if the Second Circuit's broad interpretation of the preemptive scope of Section 10501(b) were correct. In other words, if Section 10501(b) represented "Congress's intent to preempt state regulatory authority over railroad operations," as the Second Circuit asserts (*GMRC*, App. 15a), Congress would not have needed to expressly preempt the states' ability to impose certain taxes on railroads in Section 11501(b). These activities would have *already* been preempted by Section 10501(b). *See also* 49 U.S.C. § 11321(a) (exempting railroads "from the antitrust laws and from all other law" when engaging in certain activities).

This Court's decision in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), further evidences the Second Circuit's misguided analysis. In that case, the Court examined whether a federal law, which gave a federal agency wide jurisdiction over the operation of grain warehouses, preempted state efforts to regulate in that area. Section 29 of the U.S. Warehouse Act stated that "the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this act shall be exclusive." *See Id.* at 223-24. In finding that certain claims were not preempted, the Court held:

> The test, therefore, is whether the matter on which the State assets [sic] the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.

Id. at 236.

The Court then analyzed each of the allegations in the complaint and found that the act "contain[ed] no provisions relating expressly" to several of the matters at issue. *Id.* at 237. It concluded that "Congress has not foreclosed state action by adopting a policy of its own on these matters," and found no preemption. *Id.*

The *Rice* Court's analysis demonstrates that the Second Circuit's holding is not supportable. The requirement that GMRC go through Act 250's permitting process does not implicate, much less, clash with, any of the remedies provided in the ICCTA – especially considering that the STB lacks regulatory authority over the projects at issue. *Accord California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (preemption applies only where "no possible set of conditions" could be placed on permit that would not conflict with federal law).

The Second Circuit decision also fails to adhere to this Court's instruction that when "Congress legislates in a field which the States have traditionally occupied . . . [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress." *Rice*, 331 U.S. at 230 (emphasis added); *see also CSX Transp., Inc.*, 507 U.S. at 664. No clear and manifest purpose to preempt all pre-

construction permitting requirements can be inferred from the language of Section 10501(b).

That conclusion is reinforced by the ICCTA's legislative history. *See, e.g., Mid-Con Freight Sys. Inc. v. Michigan Public Service Comm'n*, 545 U.S. ___, 125 S.Ct. 2427, 2433 (2005) ("Our reading of the text finds confirmation in historical context"). Contrary to the view of the Second Circuit, a cursory review of the legislative history on the development of the preemptive scope of Section 10501(b) confirms that Congress sought to limit the scope of preemption. Initially, the House and the Senate could not agree on a common version, and a Committee of Conference was formed to produce a final bill. The Senate "intend[ed] that those States regulating intrastate rail transportation continue to be required to regulate only in a manner consistent with the [Interstate Commerce Act]." S. Rep. 104-176, at 5, 1995 WL 701522 at *6. The House sought to eliminate the states' authority "to administer economic regulation of railroads," and further advocated the complete exclusivity of federal remedies, which was "intended to encompass all statutory, common law, and administrative remedies addressing the rail-related subject matter jurisdiction of the [STB]." H.R. Rep. No. 104-311, at 95, 1995 U.S.C.C.A.N. at 807. The House had proposed: "Except as otherwise provided in this part, the remedies provided under this part are exclusive and preempt the remedies provided under Federal or State law." *Id.* at 793.

In formulating a compromise, the Committee of Conference rejected the House's broader scope, and added the limiting phrase "with respect to regulation of rail transportation" to the House's proposed preemption clause. The Committee of Conference "clarif[ied] that the

exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally." H.R. Conf. Rep. 104-422, at 167, 1995 U.S.C.C.A.N. at 852. Therefore, preemption under Section 10501(b) was never intended to apply to all state laws that touch on rail transportation. *See, e.g., Florida East Coast Railway*, 266 F.3d at 1331 (preemption only extends to "*regulation* of rail transportation").

Finally, the Second Circuit's faulty decision is further evidenced by the illogical result it produces. As discussed above, *see supra* pp. 23-24, the *per se* preemption of permitting programs such as Act 250 allows many railroad projects to evade state and local environmental review. Because many of these projects are also outside of the STB's regulatory authority, railroads can operate in a "regulatory void" – completely free of oversight. Congress could not have intended this conclusion.

By not following this Court's precedents and failing to give the phrase "with respect to regulation of rail transportation" the limiting effect that Congress expressly intended, the Second Circuit erred in concluding that Act 250 was entirely preempted.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 2005

APPENDIX

United States Court of Appeals,

Second Circuit.

GREEN MOUNTAIN RAILROAD CORPORATION,
Plaintiff-Appellee,

v.

State of VERMONT, Vermont Agency of Natural Resources and William H. Sorrell, as Attorney General of the State of Vermont,

Defendants-Appellants.

No. 04-0366-CV.

Argued: Dec. 6, 2004.

Decided: April 14, 2005.

*639 Jeanne Elias, Assistant Attorney General for the State of Vermont, (Rebecca M. Ellis, Bridget Asay, Assistant Attorneys General, on the brief) Montpelier, VT, for Defendants-Appellants.

Robert B. Luce, (Eric A. Poehlmann, on the brief) Downs Rachlin Martin PLLC, Burlington, VT, for Plaintiff-Appellee.

Evelyn G. Kitay (Ellen D. Hanson, General Counsel, on the brief) Washington, D.C. for Amicus Curiae Surface Transportation Board.

Robert M. Jenkins III, David M. Gossett, Mayer Brown Rowe & Maw LLP, Washington D.C.; Louis P. Warchot, Dennis J. Starks, Association of American Railroads, Washington, D.C.; George A. Aspatore, Sarah J. Bailiff, Paul Guthrie, Thomas J. Healey, Paul R. Hitchcock, Theodore K. Kalick, Robert T. Opal, Louise Anne Rinn, Peter J. Shudtz, Sidney L. Strickland, Jr., of Counsel, on submission, for Amicus Curiae Association of American Railroads.

Before: CARDAMONE, JACOBS, CABRANES, Circuit Judges.

JACOBS, Circuit Judge.

Green Mountain Railroad Corporation ("Green Mountain") proposed to build transloading facilities on its property in Vermont, and brings this action seeking a declaration that Vermont's environmental land use statute, Act 250, Vt. Stat. Ann. Tit. 10, § 6001 *et seq.*, is for that purpose preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101 *et seq.* (the "Termination Act"). The State of Vermont, its Agency of Natural Resources and the State Attorney General appeal from a judgment entered in the United States District Court for the District of Vermont (Murtha, *J.*), granting Green Mountain's motion for summary judgment on the preemption ground. *Green Mountain R.R. Corp. v. Vermont,* No. 01-CV-181, 2003 U.S. Dist. LEXIS 23774, at *2-3 (D.Vt. Dec. 15, 2003).

The Termination Act expressly preempts "remedies provided under Federal or State law" and vests with the Surface Transportation Board (the "Transportation Board"), a federal agency, exclusive jurisdiction over "transportation by rail carriers" and "the construction ... of ... facilities ...." 49 U.S.C. § 10501(b). The term "transportation" includes a "warehouse ... yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102.

"We review a district court's grant of summary judgment *de novo.*" *See Young v. County of Fulton,* 160 F.3d 899, 902 (2d Cir.1998). In so doing, we construe the evidence in the light most favorable to the State as the non-moving party, and draw all reasonable inferences in

its favor. *See *640 Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). For the reasons that follow, we affirm.

I

Green Mountain is a "rail carrier" as defined by the Termination Act, 49 U.S.C. § 10102(5), with 52 miles of track between Rutland, Vermont and Cold River, New Hampshire. The line serves transhipping industries, *i.e.*, industries that rely on trucks to transport goods from the rail site for processing elsewhere. Along its rail line in Rockingham, Vermont, Green Mountain owns a 66-acre tract known as "Riverside," bounded by the Connecticut River on the east. Portions of Riverside are wetlands unusable for development.

Green Mountain proposed to build facilities at Riverside to serve the following operations: (1) unloading bulk salt arriving by rail for local distribution by truck or for temporary storage in a shed pending distribution; (2) temporary storage and transport of "non-bulk goods, such as steel pipe[s]"; and (3) unloading bulk cement arriving by rail for storage in silos and eventual transport by truck. Some of these operations are conducted within a 100-foot strip alongside the Green Mountain tracks and the Connecticut River.

Vermont argues that construction of the transloading facilities is subject to Act 250, an environmental land use statute that mandates preconstruction permits for land development. Permit applications are filed with one of nine District Commissions that evaluate environmental impact using ten criteria, including: "undue water or air pollution," Vt. Stat. Ann. Tit. 10, § 6086(a)(1), and "undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural

areas," Vt. Stat. Ann. Tit. 10, § 6086(a)(8). The District Commission's decisions are appealable to Vermont's Environmental Board; decisions of the Environmental Board are appealable directly to the Vermont Supreme Court. Vt. Stat. Ann. Tit. 10, § 6089(a) & (b). Most permit decisions under Act 250 are issued within 60 days from the filing of an application. [FN1]

> FN1. Green Mountain contends that this expedited schedule (as cited by the State) applies only to "minor" amendments to existing permits, whereas its proposal is likely to be treated as a "major" application. State statistics collected from January 1998 through December 2002 indicate that the average timetable for "major" permit applications was 303.39 days. More than half of landowner appeals of District Commission decisions to the Vermont Environmental board took more than nine months in 2001.

In 1997, PMI Lumber leased part of Riverside and applied for an Act 250 construction permit. PMI Lumber proposed to satisfy environmental criteria by a 75-foot buffer zone along the river. The Vermont Agency of Natural Resources recommended that the buffer be increased to 100 feet.

A local permitting agency subsequently issued Land Use Permit # 2W0038-2 (the "dash-2 permit") in the names of PMI Lumber and Green Mountain. Condition 14 required maintenance of a 100-foot buffer zone. When PMI Lumber ceased operations at the site, Green Mountain used it for its transloading activities. Green Mountain encroached on the buffer zone with a settling pond, storage of materials, and vehicles.

In Spring 1998, Green Mountain sought to amend the dash-2 permit to allow construction of a 100-foot by 275-foot salt storage shed. In January 1999, the State granted Land Use Permit # 2W0038-3 (the "dash-3 permit"), which stipulated conditions, including that the shed be rectangular, and either brown or dark green. Several months later, in October 1999, Green Mountain applied for another permit *641 amendment (the "dash-3B permit" application) to modify the size, color and location of the salt shed. Although no such permit issued, Green Mountain started construction of its modified salt shed in November 1999.

In January 2000, the State issued a notice of violation of the dash-2 permit, citing (among other things) storage of materials within the 100-foot buffer zone. The State issued a second notice of violation in February 2000, alleging construction of the salt shed without the dash-3B permit.

In Spring 2000, the State conducted hearings on Green Mountain's dash-3B salt shed permit application. Green Mountain objected orally and in writing that the State Environmental Commission lacked jurisdiction to adjudicate the pending permit application because the Termination Act, which expressly preempts "remedies provided under Federal or State law" and vests with the Transportation Board, a federal agency, exclusive jurisdiction over "transportation by rail carriers," 49 U.S.C. § 10501, preempts Act 250.

Faced with the threatened enforcement of Act 250, Green Mountain filed this suit in June 2001, seeking a declaration that the Termination Act preempts Act 250. Simultaneously, Green Mountain requested a declaratory order to the same effect from the Transportation Board.

The Transportation Board denied the declaratory relief in May 2002, deferring to the district court. In the meantime, the State moved to dismiss the district court action. While that motion was pending, the State issued the dash-3B permit in August 2001. A month later, the district court granted the State's motion to dismiss Green Mountain's facial challenge to the applicability of Act 250, but ordered "further development of the record" to determine whether the State's "effort to enforce one or more conditions of the [dash-2] Permit violates the [Termination Act] in this particular case." *Green Mountain R.R.*, No. 1: 01CV181, 2003 U.S. Dist. LEXIS 23774, at *2 (quoting an earlier ruling) (internal quotation marks omitted).

Following discovery, the parties cross-moved for summary judgment. On December 15, 2003, the court granted Green Mountain's motion (and denied the State's motion) on the ground that "the state's efforts to enforce Act 250 in this case are preempted under the [Termination Act]." *Id.*

II

The question presented is whether the Termination Act preempts Vermont's Act 250 with respect to the underlying permit controversy. State law is preempted by federal law when: (1) the preemptive intent is " 'explicitly stated in [a federal] statute's language or implicitly contained in its structure and purpose' "; (2) state law "actually conflicts with federal law"; or (3) "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519,

525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), and *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)). The "ultimate touch-stone" of preemption analysis is congressional intent: "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (internal quotation marks omitted).

The Termination Act contains an express preemption clause:

> Except as otherwise provided in this part, the remedies provided under this *642 part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). The Termination Act Section 10501 vests the Transportation Board with exclusive jurisdiction over "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b). "Transportation" is expansively defined to include: "a locomotive, car, vehicle, vessel, warehouse ... yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102(9). Certainly, the plain language grants the Transportation Board wide authority over the transloading and storage facilities undertaken by Green Mountain. *See City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th

Cir.1998); *see also R.R. Ventures, Inc. v. STB,* 299 F.3d 523, 530 (6th Cir.2002) ("[I]f a railroad line falls within its jurisdiction, the [Transportation Board's] authority over abandonment is both exclusive and plenary.").

Other federal courts recognize that the Termination Act preempts most pre-construction permit requirements imposed by states and localities. *See, e.g., City of Auburn,* 154 F.3d at 1030-31 (affirming the Transportation Board's finding that the Termination Act preempted a local environmental permitting requirement); *Soo Line R.R. Co. v. City of Minneapolis,* 38 F.Supp.2d 1096, 1101 (D.Minn.1998) ("The Court concludes that the City's demolition permitting process upon which Defendants have relied to prevent [the railroad] from demolishing five buildings ... that are related to the movement of property by rail is expressly preempted by the [Termination Act]."); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n,* 944 F.Supp. 1573, 1585 (N.D.Ga.1996) (finding state regulation of railroad agency closing preempted by the Termination Act).

For example, the Ninth Circuit concluded, in affirming a Transportation Board decision, that the Termination Act preempted state and local environmental regulations requiring a railway to submit to a permitting process before making repairs and improvements on its track line. *City of Auburn,* 154 F.3d at 1027-28, 1030-31. "[C]ongressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause." *Id.* at 1031; *see also Ga. Pub. Serv. Comm'n,* 944 F.Supp. at 1580-82.

The Transportation Board has likewise ruled that "state and local permitting or preclearance requirements (including environmental requirements) are preempted

because by their nature they unduly interfere with interstate commerce." *Joint Petition for and Declaratory Order--Boston and Maine Corp. and Town of Ayer, MA,* STB Finance Docket No. 33971, 2001 WL 458685, at *5 (S.T.B. Apr. 30, 2001), *aff'd, Boston & Maine Corp. v. Town of Ayer,* 191 F.Supp.2d 257 (D.Mass.2002)(affirming the Transportation Board's determination that town's pre-construction permit requirement was preempted by the Termination Act); *see also Green Mountain R.R. Corp.,* Petition for Declaratory Order, STB Finance Docket No. 34052, 2002 WL 1058001 (S.T.B. May 24, 2002). As the agency authorized by Congress to administer the Termination Act, the Transportation Board is " 'uniquely qualified to determine whether state law ... should be preempted' " by the Termination Act. [FN2] *643 *Ga. Pub. Serv. Comm'n,* 944 F.Supp. at 1584 (quoting *Medtronic,* 518 U.S. at 496, 116 S.Ct. 2240).

> FN2. Whether the Transportation Board is entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) is not material to the Court's decision. We therefore decline to reach the issue.

Like the regulations and ordinances consistently struck down by federal courts and by the Transportation Board, Act 250 mandates a pre-construction permit. Act 250's pre-construction permit requirement is preempted for two reasons: (i) it "unduly interfere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations," *Town of Ayer,* STB Finance Docket No. 33971, 2001 WL 458685, at *5; and (ii) it can be time-consuming, allowing a local body to delay construction of

railroad facilities almost indefinitely. *Green Mountain R.R. Corp.*, 2003 U.S. Dist. LEXIS 23774, at *13.

Nevertheless, as the district court observed, "not all state and local regulations are preempted [by the Termination Act]; local bodies retain certain police powers which protect public health and safety." *Id.* It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption. *Cf. Vill. of Ridgefield Park v. New York, Susquehanna & W. Ry. Corp.*, 163 N.J. 446, 750 A.2d 57, 64 (2000) (noting the Transportation Board's position that: (1) "while state and local government entities ... retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce"; and (2) "railroads are exempt from the traditional permitting process but not ... from most other generally applicable laws").

The legislative history of the Termination Act supports this approach: "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to

address and encompass all such regulation and to be completely exclusive." *See* H.R.Rep. No. 104-311, at 96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 808. We need not draw a line that divides local regulations between those that are preempted and those that are not, because in this case preemption is clear: the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary rulings of a state or local agency.

III

The State's primary appellate argument is that Act 250 cannot be preempted on its face unless there is "no possible set of conditions that [the permitting authority] could place on its permit that would not conflict with federal law." *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987) (applying facial challenge standard in a statutory preemption case). We disagree. *644 No doubt, there could be permit applications affecting railroad facilities that could be promptly approved without the slightest imposition on rail operations. However, what is preempted here is the permitting process itself, not the length or outcome of that process in particular cases. *Cf. Chamber of Commerce v. Lockyer*, 364 F.3d 1154, 1169 (9th Cir.2004) (noting that in certain situations federal law preempts "the act of regulation itself, not the effect of the state regulation in a specific factual situation"). *California Coastal Commission* is easily distinguished on that basis, as well as on the absence of a preemption provision. [FN3]

FN3. In *California Coastal Commission*, a mining company sought to enjoin a state agency from requiring the company to obtain a permit to mine on federal land. The Supreme Court ruled that in the federal mining statutes, "Congress specifically disclaimed any intention to pre-empt pre-existing state authority" and that the federal mining statute "does not automatically pre-empt all state regulation of activities on federal lands." 480 U.S. at 593, 107 S.Ct. 1419. The federal mining statutes required that land-use plans of the federal agency charged with administering the federal mining statutes "provide for compliance with" existing state and federal environmental laws. *Id.* at 587, 107 S.Ct. 1419 (internal quotation marks omitted). Because the mining company sought injunctive relief "before discovering what conditions the Coastal Commission would have placed on the permit," the Court concluded that the mining company's "case must stand or fall on the question whether any *possible* set of conditions attached to the Coastal Commission's permit requirement would be pre-empted." *Id.* at 588, 107 S.Ct. 1419. Vermont failed to raise explicitly this facial preemption argument with the district court. As a result, the district court's opinion does not discuss *California Coastal Commission*. Generally, we do not consider an issue raised for the first time on appeal. *See Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 103 (2d Cir.1998). However, Vermont points out that, although it never cited to *California Coastal Commission* in its submissions to the district court, it preserved this issue for appellate

> review by arguing, in its August 2001 reply to Green Mountain's opposition to its motion to dismiss, that to succeed on its facial preemption claim, Green Mountain was obligated to show "that there are no circumstances under which Act 250 could be found constitutional," and did not press the argument thereafter because it believed that the district court adopted the State's position on facial preemption when it stated, granting in part the State's motion to dismiss: "to the extent the [State] ask[s] the Court to dismiss Green Mountain's claim that the [Termination Act] preempts Act 250 under all circumstances, the motion is granted."

"The facial/as-applied distinction would be relevant only if we might find some applications of the statute preempted and others not.... [W]here a state statute is in direct conflict" with a federal statute "or one of its processes," the "focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation." *Lockyer*, 364 F.3d at 1169.

IV

The State argues that Act 250 withstands preemption because it is an environmental, rather than economic, regulation. The distinction is not useful. "[I]f local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *City of Auburn*, 154 F.3d at 1031. Green Mountain serves industries that rely on trucks to transport goods from the rail site for processing; so the proposed transloading and storage facilities are integral to the railroad's operation and are

easily encompassed within the Transportation Board's exclusive jurisdiction over "rail transportation." Notwithstanding the environmental goals of the legislation, Act 250's permitting process "necessarily interfere[s]" with Green Mountain's "ability to construct facilities and conduct economic activities." *Green Mountain R.R. Corp.*, 2003 U.S. Dist. LEXIS 23774, at *13. *645

V

The State argues that *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir.1999), compels a different conclusion. In *Ace Auto Body*, this Court held that the section of the Termination Act relating to motor carrier operations (49 U.S.C. § 14501) did not preempt New York's police power to suppress the practice of "chasing," whereby tow trucks compete for business by racing ("often recklessly") to accidents broadcast on police radio frequencies. *Ace Auto Body*, 171 F.3d at 769, 779. The State's reliance on *Ace Auto Body* is misplaced. The federal preemption language at issue in that case provides that a state or municipality "may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." *Id.* at 770 (quoting 49 U.S.C. § 14501(c)(1)). The Court held that the "related to" phrase focused the preemption on economic regulations and reflected congressional intent to leave the state's historic police powers undisturbed where "only incidental economic burdens can be discerned." *Id.* at 774. We concluded that the chasing regulations were "sufficiently safety-oriented" while having no more than an incidental economic effect on the industry. *Id.*

In contrast to the federal statute at issue in *Ace Auto Body*, the plain language of Section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities. "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *Ga. Pub. Serv. Comm'n*, 944 F.Supp. at 1581 (holding that the Termination Act preempted state regulation of railroad agency closing). We therefore need not conduct a fact-based inquiry weighing the economic impact of Act 250's permitting process upon Green Mountain; based on the facts before the Court, the State's effort to regulate rail transportation through the Act 250 pre-permitting process is necessarily preempted by the Termination Act.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

404 F.3d 638

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

GREEN MOUNTAIN RAILROAD
CORPORATION
V.
STATE OF VERMONT, VERMONT AGENCY OF
NATURAL RESOURCES, AND WILLIAM H. SORRELL,
as Attorney General of the State of Vermont

RULING ON CROSS MOTIONS FOR
SUMMARY JUDGMENT

(Papers 52 and 63)

This case involves the extent to which, consistent with the Interstate Commerce Commission Termination Act of 1995 (hereinafter "ICCTA"), the State of Vermont and its Agency of Natural Resources (collectively referred to as "defendants" or the "state") may apply its environmental regulation statute, Act 250, to the Green Mountain Railroad Corporation's (hereinafter "Green Mountain") use and expansion of its facilities in Rockingham. The state argues the railroad's activities must comply with Act 250 and all permits issued thereunder. Green Mountain's position is any application of Act 250 is preempted by the ICCTA.

On July 17, 2001, the state moved to dismiss the plaintiff's facial challenge to the applicability of Act 250 for failure to state a claim upon which relief can be granted. See Defendants' Motion to Dismiss or, in the Alternative, to Abstain (Paper 9) at 1. Finding this

preemption issue "requires case-by-case analysis," the Court held: "[T]o the extent the defendants ask the Court to dismiss Green Mountain's claim that the ICCTA preempts Act 250 under all circumstances, the motion is granted . . However, whether the defendants' effort to enforce one or more conditions in the 1997 Permit violates the ICCTA in this particular case requires further development of the record . . ." Ruling on Pending Motions (Paper 21) at 8, 10.

Having provided the Court with a record supplemented by affidavits and discovery, the parties have filed cross motions for summary judgment. Upon review of the undisputed, material facts, the Court finds the state's efforts to enforce Act 250 in this case are preempted under the ICCTA. Therefore, for the reasons discussed below, Green Mountain's Motion for Summary Judgment is GRANTED, and the state defendants' Motion for Summary Judgment is DENIED.

I. Background

On a motion for summary judgment, the moving party has the initial burden of informing the Court of the basis for its motion and of identifying the absence of any genuine issue of material fact. See, e.g., Chambers v. TRM Copy Centers,, Corp., 43 F.3d 29, 36 (2d Cir. 1994). Where, as here, a motion for summary judgment is supported by affidavits or other documentary evidence, the party opposing that motion must set forth specific facts showing there is a genuine, material issue for trial. See Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 526 (2d Cir. 1994). Only disputes over facts which might affect the outcome of the suit under the governing law preclude the entry of summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Upon review of the record, the Court finds the following material facts undisputed. Green Mountain has 52 miles of track between Rutland, Vermont and Cold River, New Hampshire. See generally Verified Statement of Jerome Hebda (hereinafter "Hebda Statement")(appended to Paper 65 as Ex. A). It primarily operates as an interstate freight railroad, although it derives approximately 10 percent of its revenue from passengers. See Hebda Statement at para. 3.

About six years ago, in an attempt to expand its business and increase profitability, Green Mountain acquired 62 acres of land to add to its existing site in Rockingham known as "Riverside." Riverside now is approximately 66 acres and is bounded on the west by a state highway and Green Mountain's railroad line and on the east by the Connecticut River. Green Mountain uses Riverside as a yard for transloading freight between trains and trucks and for storing freight and railroad equipment. See, e.g., Hebda Statement at paras. 4, 8.

The Riverside site is within the jurisdiction of Vermont's District #2 Environmental Commission (hereinafter the "District 2 Commission"). On November 12, 1997, Green Mountain and its then tenant, PMI Lumber Transfer, Inc. (hereinafter "PMI"), obtained from the District 2 Commission Permit #2W0038-2 (hereinafter the "Dash 2 Permit"). See Dash 2 Permit (appended to Paper 55, Affidavit of April Hensel, as Ex. C). The Dash 2 Permit authorized the construction of a 20-foot by 30-foot office building and the operation of a forest products distribution yard. See Dash 2 Permit at 1. It also contained 27 conditions, including: "The permittees shall maintain a 100-foot undisturbed, naturally vegetated buffer strip with no mowing or cutting of vegetation

between the top of the bank of the Connecticut River and any disturbed areas." Dash 2 Permit at para. 14. PMI left Riverside in 1998, and Green Mountain continued using the site for transloading activities. See Hebda Statement at para. 8.

On January 13, 1999, the District 2 Environmental Commission issued Green Mountain Permit #2W0038-3 (hereinafter the "Dash 3 Permit"), which authorized the railroad to construct a salt storage shed, conveyor pit, rail siding and truck scale at Riverside. See Dash 3 Permit (appended to Paper 55, Affidavit of April Hensel, as Ex. E) at 1. The Dash 3 Permit contained 24 conditions, including that the storage shed be rectangular, next to the rail, and either brown or dark green. See Dash 3 Permit at para. 19.

Green Mountain eventually abandoned the Dash 3 Permit project as originally proposed and, on October 14, 1999, submitted another permit application, which the District 2 Commission delineated permit application #2W0038-3B (hereinafter the "Dash 3B permit"). See Dash 3B Permit Application (appended to Paper 55, Affidavit of April Hensel, as Ex. F). The Dash 3B Permit Application included a proposal for a new salt siding project and a different salt shed to be built in a different location from the one first proposed in the Dash 3 Permit. Although no final "Dash 3B Permit" was issued, Green Mountain built its proposed salt transload and storage shed.

On January 24, 2000, the District 2 Commission issued Green Mountain a notice of alleged violation of several conditions of the Dash 2 Permit, primarily relating to the failure to maintain the 100-foot buffer zone. Specifically, the state asserts the railroad has conducted prohibited

activities in the buffer zone, including storing brick, lumber and train parts, permitting the entry of vehicles in the zone, and arranging for the installation of utility poles. See Notice of Alleged Violation (appended to Paper 55, Affidavit of April Hensel, as Ex. G). Several weeks later, on February 8, 2000, it issued a notice of violation to Green Mountain for its construction of the "Dash 3B" salt shed without a permit. See Notice of Alleged Violation (appended to Paper 55, Affidavit of April Hensel, as Ex. H).

Anticipating an unfavorable outcome in state administrative proceedings, in October 2001, and again in February 2002, Green Mountain requested a declaratory order from the Surface Transportation Board (hereinafter "STB"). Through those requests, it sought permission to continue construction at Riverside to permit it to transload bulk cement and otherwise expand its operations. According to Green Mountain, its proposed facility requires construction of a spur track within the 100-foot buffer zone. Citing this Court's enforcement authority and its intent to resolve these issues without referring the matter, the STB declined to issue the requested declaratory order. See In re Green Mountain, Railroad Corp., STB Finance Docket No. 34052, 2002 WL 1058001 (ICC)(May 24, 2002) (appended to Paper 65 at Ex. S).

In December 2002, Green Mountain requested a declaratory ruling from Vermont's District Environmental Coordinator as to whether its proposed construction of cement silos and a utility building requires an amendment to its existing Act 250 permit or whether the project falls within a statutory exception to the permit requirement. The District Coordinator determined an

amendment to the permit was required, and Green Mountain appealed the jurisdictional opinion to the Environmental Board. The Environmental Board held a hearing on Green Mountain's appeal on June 25, 2003, and ultimately affirmed the District Coordinator's advisory opinion. See Declaratory Ruling #422 (appended to Paper 65 as Ex. I) at 8, sections B and C.

According to Green Mountain's president, Jerome Hebda, the expansion of Riverside that has thus far been completed has been "modestly successful." See Hebda Affidavit at para. 5 (In 1997, Green Mountain originated and terminated 416 carloads; by 2000, that number had nearly doubled). Nevertheless, Mr. Hebda maintains the state's Act 250 requirements are economically detrimental to the railroad's operations. He explains:

> [T]he circumstances now faced by GMRC [Green Mountain] are not the same as those we faced in 1997, when PMI and GMRC jointly sought Act 250 authority to construct an office building and forest products distribution yard at Riverside. The expansion of GMRC's Riverside business since that time requires that GMRC utilize its property more extensively than appeared to be necessary in 1997. Ground storage of goods that have arrived by rail and await removal by truck, or which arrive by truck and await loading into rail cars, is an essential part of our business and requires more land as the business grows. Our customers have requested rate quotations from GMRC that include transloading and temporary storage of goods between rail and truck shipments, and GMRC has provided such rates in order to attract and retain the business. . . . Moreover, storage areas must be

> interspersed with passageways for vehicular access and must be situated as closely as possible to rail tracks in order to minimize the distance and time consumed in the removal of shipments from railcars and the loading of shipments into railcars. . . . Electric service is needed at the site to provide electric power and illumination during short days. Depriving GMRC of the use of all land at Riverside within 100 feet of the Connecticut River would not only bring business growth to a standstill, but limit GMRC's ability to handle existing business.

Hebda Statement at para. 22.

II. Discussion

A. Act 250 as a Preclearance Statute

Act 250 is Vermont's land use statute. It was enacted to protect the state's environmental resources and to preserve its public lands. See Southview Assoc. v. Bongartz, 980 F.2d 84, 89 (2d Cir. 1992). The Act establishes a statewide permitting process for various forms of land development. See 10 V.S.A. § 6001-6108. When implementing Act 250, the state attempts to coordinate maximum economic development with minimal environmental impact. As applied, however, Act 250 establishes a preclearance permitting process; a development subject to Act 250 cannot proceed until it has received state approval and an Act 250 permit. See In re Spring Brook Farm Found., Inc., 164 Vt. 282, 285 (1995)("Vermont's land use law, Act 250, requires a permit prior to the commencement of any development.")

When Green Mountain and PMI, a non-railroad business, jointly operated at Riverside, the site arguably had been partially subject to Act 250 regulation, as least so far as PMI's activities were concerned. Now, as a rail

carrier operating alone at Riverside, Green Mountain's activities are subject to oversight under the ICCTA, 49 U.S.C. §§ 10101 et seq., as administered by the STB, 49 U.S.C. § 10501.

The plaintiff maintains all conditions included in permits issued pursuant to Act 250 now are preempted by the ICCTA, and the state cannot enforce its permits or require a new permit for the proposed Riverside expansion. "State law is preempted by federal law only when 1) a federal statute expressly preempts state action, 2) state law is in direct conflict with federal law, or 3) federal regulation is pervasive in the field." Omva, Inc. v. Vermont, 80 F. Supp. 2d 211, 217 (D. Vt. 2000) (citing Cipollone v. Ligaett Group, Inc.,, 505 U.S. 504, 516 (1992)).

The ICCTA contains the following preemption provision:

> The jurisdiction of the [STB] over
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b).

By this provision, Congress granted the STB broadened preemptive jurisdiction over facilities that are an integral part of railroad transportation. See City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998); see also CSX Trans. Corp. v. Georqia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996)(ICCTA preempts state regulatory authority over rail agency closings). When addressing the preemptive scope of 49 U.S.C. § 10501(b), courts have found most zoning ordinances and local land use permit requirements are preempted. See, e.q., Railroad Ventures, Inc. v. STB, 299 F.3d 523, 530 (6th Cir. 2002)("if a railroad line falls within its jurisdiction, the STB's authority over abandonment is both exclusive and plenary"); CSX Transp., Inc. v. City of Plymouth, 92 F. Supp. 2d 643, 659 (E.D. Mich. 2000)("if there is to be a limit on the amount of time that a train is preempted because they necessarily interfere with a rail permitted to block a crossing, it must come from the federal government"), aff'd, 283 F.3d 812 (6th Cir. 2002); see also Guckenberq v. Wisconsin Cent. Ltd., 178 F. Supp. 2d 954, 959 (E.D. Wis. 2001) (common law nuisance claim is preempted where suit "seeks to proscribe activity . . . on [railway's] side track").

Specifically, courts have noted that preclearance requirements, including environmental requirements, are carrier's ability to construct facilities and conduct economic activities. "To the extent the state law is viewed as having the effect of requiring the railroad to undergo substantial capital improvements, [it] is preempted by the Interstate Commerce Commission Termination Act." CSX Transp., 92 F. Supp. 2d at 658.

Nevertheless, not all state and local regulations are preempted; local bodies retain certain police powers which protect public health and safety. See Dakota, Minnesota & Eastern R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1011 (D.S.D. 2002) (state eminent domain statute which requires railroad to provide free easement to utility companies is not preempted by ICCTA); Laviqne v. CXS Transp., Inc., 2002 WL 1424808 (Mich. App. 2002) (affirming trial court's granting of an easement by necessity over tracks for access to plaintiff's property). For example, the Vermont Supreme Court has found certain City of Burlington zoning ordinances are not preempted by the ICCTA, including "control activities such as routing of trucks leaving the facility," and "conditions designed to avert potential contamination from the salt shed" because such regulations do not interfere with railroad operations, but rather address matters within a municipality's traditional police powers. See In re Vermont Ry., 171 Vt. 496 (2000). The parameters of ICCTA preemption have been elucidated in some STB decisions as well As the agency charged with administering the ICCTA, the STB's interpretation of the statute and its preemptive reach is entitled to consideration. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984); In re Vermont Ry., 171 Vt. at 500.

In Joint Petition for Declaratory Order-Boston and Maine Corp. and Town of Aver, STB Finance Docket No. 33971, 2001 WL 458685 (ICC) at *5-6 (Apr. 30, 2001), the STB provided guidance as to how 49 U.S.C. § 1051(b) applies to state and local regulation of an existing facility. In part, the STB opined:

Court and agency precedent interpreting the statutory preemption provision have made it clear that, under this broad preemption regime, state and local regulation cannot be used to veto or unreasonably interfere with railroad operations. Thus, state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations. . . .

This does not mean that all state and local regulations that affect railroads are

preempted . . . . [S]tate and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally are not preempted . . . . While a locality cannot require permits prior to construction, the courts have found that a railroad can be required to notify the local government "when it is undertaking an activity for which another entity would require a permit" and to furnish its site plan to the local government. . Furthermore, a town may seek court enforcement of voluntary agreements that the town had entered into with a railroad, notwithstanding section 10501(b), because the preemption provisions should not be used to shield the carrier from its own commitments, and "voluntary agreements must be

> seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." . . .

Finally, nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act. . . . Thus, the lack of a specific environmental remedy at the Board or under state and local laws (as to construction projects such as this, over which the Board lacks licensing power) does not mean that there are no environmental remedies under other Federal laws.

Of course, whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted. (citations and footnotes omitted).

Thus, local governments may require railroads such as Green Mountain, in advance of construction, to "share their plans with the community, when they are undertaking an activity for which another entity would require a permit . . . ." Id. at *7; see also 49 C.F.R. § 1105.1 et seq. (administrative rules which ensure the STB's consideration of environmental and energy factors

under federal laws like NEPA). It is clear that, in cases such as this one, they may not apply a law like Act 250 so as to require pre-construction approval and permitting. Such a procedure is preempted by the ICCTA. See Cities of Auburn and Kent, Wa.-Petition for Declaratory Order-Burlington Northern Railroad Co-Stampede Pass Line, STB Finance Docket No. 33200, 1997 WL 362017 (ICC)(July 1, 1997) (state or local permitting process for prior approval of project, even an environmental review process, is preempted).14

B. The Salt Shed

The state, in part, contends Green Mountain built a salt shed prior to obtaining an Act 250 permit and continues to use the salt shed without a permit. See Defendants' Reply Memorandum (Paper 66) at 13. This claim is somewhat confusing in that the Dash 3 Permit authorizes "the construction and operation of a 100-foot by 275-foot salt storage shed, conveyor pit, rail siding and truck scale." See Dash 3 Permit at 1. In any event, as discussed supra, the state cannot order Green Mountain to obtain an Act 250 permit prior to constructing a salt shed because this action would operate as a prohibited preclearance requirement.

The January 13, 1999 permit also provides, "[t]he building shall be either brown or dark green in color to mitigate the visual impact of its 300 [foot] length." Dash 3 Permit at para. 19. The Dash 3 Permit Application later proposed the building would be an "earthtone" or "sandstone" color. See Dash 3B Application at criterion 8. The state maintains the roof of the salt shed is "beige" and does not comply with the permit's requirement of being either "brown" or "dark green." See Defendants' Memorandum of Law (Paper 53) at 17 n.5.

At most, this appears to be a de minimis transgression. Green Mountain argues that, to comply with the state's "color demand," it "would essentially have to scrap the old shed and construct a new one." Plaintiff's Memorandum of Law (Paper 64) at 23. Any order requiring substantial renovation or destruction to the salt shed because of its color would obviously unduly interfere with rail operations and thereby run afoul of the ICCTA. In any event, assuming this "color" requirement is similar to a non-discriminatorily-applied planning and zoning requirement which the STB has suggested is within local discretion, the Court concludes that the color "tan" is sufficiently "brown" or "earthtone" so as to be in compliance with the Dash 3 Permit's requirement.

C. Planned Cement Silo and Spur Track

Green Mountain also has proposed improvements at Riverside which include a rail siding, a new roadway, four 22foot-diameter silos to hold cement, ramps, and a 12' x 20' office and utility building. If operated as planned, the cement cargo will arrive in hopper cars, be dumped into a pit, moved by a conveyor belt into a silo, and then dispensed from the silo to trucks for distribution. According to Green Mountain, this project "requires alterations to existing rail track, a truck scale, and modification of vehicular access, and - like the salt shed siding - will involve less than 10 acres of disturbed land." See Paper 64 at 14.

The cement silos Green Mountain has proposed to construct for use by a transloading customer will have a 500-ton capacity, the equivalent of five rail cars, and will approach 100 feet in height. If necessary, the railroad will employ sound barriers to diffuse undue noise. See Hebda Statement at para. 14. The Green Mountain customer

which plans to use these silos will generate approximately $180,000 per year in revenue. See Hebda Statement at para. 16. Green Mountain also explains that it plans to construct a 1000 foot spur track to enhance commercial flexibility for its customers. See Hebda Statement at para. 19.

"[W]hen section 10501(b) grants the STB exclusive jurisdiction over `transportation by rail carriers'," it logically includes the yard, property, facilities, and any intermodal equipment used in connection with a railroad, or related to the movement of passengers or property." Soo Line R.R. Co. v. City of Minneapolis, 38 F. Supp. 2d 1096, 1099 (D. Minn. 1998). While the state has the right to review these plans, it cannot, consistent with ICCTA preemption, require Green Mountain to secure Act 250 permits before commencing construction.

C. The Buffer Strip

Condition 14 of the Dash 2 Permit requires Green Mountain to maintain a 100-foot undisturbed, naturally vegetated buffer strip with no mowing or cutting of vegetation between the top of the bank of the Connecticut River and any disturbed areas. This condition was renewed in the Dash 3 Permit. It is undisputed that Green Mountain's activities and construction have disturbed portions of the strip.

According to the plaintiff, of the approximately 66 acres at the Riverside site, about 31 acres are unusable wetlands. Of the remaining 35 acres, the state-imposed buffer zone consumes approximately 19 acres, thereby severely restricting the railroad's ground storage capacity and other usable land. Green Mountain also states that its current use of the buffer zone to store materials is necessary to carry out its rail activities. See Paper 65 at

para. 20. According to Green Mountain, these facts demonstrate the buffer zone's undue interference with its rail operations. See Plaintiff's Reply (Paper 69) at 4 and n.3.

It is undisputed that Riverside is located near the Connecticut River, a valuable environmental and recreational resource. According to the state, the buffer zone protects the fish habitat, prevents erosion of the stream bank, helps maintain water quality, and provides an aesthetic benefit. Nevertheless, maintenance of this buffer zone necessarily has an economic impact on Green Mountain's ability to expand its business. Under similar circumstances, both courts and the STB have determined that state environmental regulations, however laudable, are preempted under the ICCTA. See supra at Section IIA

III. Conclusion

To the extent the state is applying Act 250 to Green Mountain's plans as a preclearance permitting process, its actions are preempted by the ICCTA. The state, however, is not without remedies. It may require prior notification of proposed projects and seek voluntary compliance with applicable Act 250 standards. It may also have standing to seek compliance with applicable federal laws, such as the Clean Air Act and the Clean Water Act. See Joint Petition, 2001 WL 458685 at *5 ("nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes . . .").

Green Mountain's Motion for Summary Judgment is GRANTED. The state's Motion for Summary Judgment is DENIED. SO ORDERED.

Dated at Brattleboro, Vermont, this 15 day of December, 2003.

United States District Court

District of Vermont

GREEN MOUNTAIN RAILROAD CORPORATION,

Plaintiff,

v.

STATE OF VERMONT, VERMONT. AGENCY OF NATURAL RESOURCES, and WILLIAM H. SORRELL, as Attorney General of the State of Vermont,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE.NUMBER: 1:01-CV-181cft

☐ Jury Verdict. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Ruling on Cross Motions for Summary Judgment (Paper No. 70) filed December 15, 2003, plaintiffs Cross-Motion for Summary Judgment (Paper No. 63) is GRANTED and defendants' Motion for Summary Judgment (Paper No. 52) is DENIED. JUDGMENT is hereby entered for plaintiff Green Mountain Railroad Corporation against defendants State of Vermont, Vermont Agency of Natural Resources, and William H. Sorrell.

RICHARD PAUL WASKO

Clerk

Date: December 16, 2003

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. VI cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code

Title 49. Transportation

Subtitle IV. Interstate Transportation

Part A. Rail

Chapter 105. Jurisdiction

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is--

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(c)(1) In this subsection--

(A) the term "local governmental authority"--

(i) has the same meaning given that term by section 5302(a) of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term "mass transportation" means transportation services described in section 5302(a) of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to--

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

United States Code

Title 49. Transportation

Subtitle IV. Interstate Transportation

Part A. Rail

Chapter 115. Federal-state Relations

§ 11501. Tax discrimination against rail transportation property

* * *

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

VERMONT STATUTES ANNOTATED

TITLE TEN. Conservation and Development

CHAPTER 151. State Land Use and Development

SUBCHAPTER 1. General Provisions

§ 6001 Definitions

When used in this chapter:

(3)(A) "Development" means:

(i) The construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.

(ii) The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws.

(iii) The construction of improvements for commercial or industrial purposes on a tract or tracts of land, owned or controlled by a person, involving more than one acre of land within a municipality that has adopted permanent zoning and subdivision bylaws, if the municipality in which the proposed project is located has elected by ordinance, adopted under chapter 59 of Title 24, to have this jurisdiction apply.

(iv) The construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land, and within any continuous period of five years.

(v) The construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county or state purposes. In computing the amount of land involved, land shall be included that is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.

(vi) The construction of improvements for commercial, industrial or residential use above the elevation of 2,500 feet.

(vii) Exploration for fissionable source materials beyond the reconnaissance phase or the extraction or processing of fissionable source material.

(viii) The drilling of an oil and gas well.

(B) Notwithstanding the provisions of subdivision (3)(A) of this section, if a project consists exclusively of any combination of mixed income housing or mixed use and is located entirely within a downtown development district designated pursuant to 24 V.S.A. § 2793, "development" means:

(i) Construction of mixed income housing with 100 or more housing units or a mixed use project with 100 or more housing units, in a municipality with a population of 20,000 or more.

(ii) Construction of mixed income housing with 50 or more housing units or a mixed use project with 50 or more housing units, in a municipality with a population of 10,000 or more but less than 20,000.

(iii) Construction of mixed income housing with 30 or more housing units or a mixed use project with 30 or more housing units, in a municipality with a population of 5,000 or more and less than 10,000.

(iv) Construction of mixed income housing with 20 or more housing units or a mixed use project with 20 or more housing units, in a municipality of less than 5,000.

(v) Construction of 10 or more units of mixed income housing or a mixed use project with 10 or more housing units where the construction involves the demolition of one or more buildings that are listed on or eligible to be listed on the state or national register of historic places.

(C) For the purposes of determining jurisdiction under subdivisions (3)(A) and (3)(B) of this section:

(i) Housing units constructed by a person partially or completely outside a designated downtown development district shall not be counted to determine jurisdiction over housing units constructed by a person entirely within a designated downtown development district.

(ii) Within any continuous period of five years, housing units constructed by a person entirely within a designated downtown district shall be counted together with housing units constructed by a person partially or completely outside a designated downtown development district to determine jurisdiction over the housing units constructed by a person partially or completely outside the designated downtown development district and within a five-mile radius.

(iii) All housing units constructed by a person within a designated downtown development district within any continuous period of five years, commencing on or after the effective date of this subdivision, shall be counted together.

(iv) In the case of a project undertaken by a railroad, no portion of a railroad line or railroad right-of-way that will not be physically altered as part of the project shall be

included in computing the amount of land involved. In the case of a project undertaken by a person to construct a rail line or rail siding to connect to a railroad's line or right-of-way, only the land used for the rail line or rail siding that will be physically altered as part of the project shall be included in computing the amount of land involved.

* - - - - - *

VERMONT STATUTES ANNOTATED

TITLE TEN. Conservation and Development

CHAPTER 151. State Land Use and Development

SUBCHAPTER 4. Permits

§ 6081 Permits required; exemptions

(a) No person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision or development, or commence development without a permit. This section shall not prohibit the sale, mortgage or transfer of all, or an undivided interest in all, of a subdivision unless the sale, mortgage or transfer is accomplished to circumvent the purposes of this chapter.

* * *

(i) The repair or replacement of railroad facilities used for transportation purposes, as part of a railroad's maintenance, shall not be considered to be substantial changes and shall not require a permit as provided under subsection (a) of this section, provided that the replacement or repair does not result in the physical expansion of the railroad's facilities.

Supreme Court, U.S.
FILED
SEP 26 2005
OFFICE OF THE CLERK

No. 05-89

In the Supreme Court of the United States

STATE OF VERMONT, *et al.*,

Petitioners,

v.

GREEN MOUNTAIN RAILROAD CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, *codified in relevant part at* 49 U.S.C. §§ 701-727, 10101-11908, amended and expanded the scope of the Interstate Commerce Act's express preemption provision. As amended, the statute specifies:

> The jurisdiction of the [Surface Transportation Board ("STB")] over—
>
> > (1) transportation by rail carriers * * *, and
> >
> > (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities * * *
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). The question presented is whether local or state governments may require railroads to participate in pre-construction permitting programs before undertaking rail transportation activities and operations that, pursuant to this provision, fall within the STB's "exclusive" jurisdiction.

RULE 29.6 STATEMENT

Respondent Green Mountain Railroad Corporation ("Green Mountain") has no parent corporations and no publicly held company owns 10% or more of its stock. Green Mountain is one of five shortline railroads that share common ownership and that together comprise the Vermont Rail System. The four other railroads in the Vermont Rail System are the Vermont Railway, Inc., The Clarendon and Pittsford Railroad Company, the Washington County Railroad Company, and the New York & Ogdensburg Railway Co., Inc. The recently formed Otter Creek Railroad Company is also part of the Vermont Rail System, but has not yet applied for STB licensure.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

As the court of appeals ably demonstrated, 49 U.S.C. § 10501(b) precludes states or localities from requiring railroads to participate in pre-construction permitting processes for rail transportation activities and operations that fall within the exclusive jurisdiction of the Surface Transportation Board ("STB" or "Board"). Although petitioners identify numerous cases that they assert conflict with the Second Circuit's decision on this question, in fact there is no such disagreement; rather, every court to consider the issue has so held, as has the STB.

Petitioners have never disputed that the facilities Green Mountain proposed to construct in this case fall within the scope of the STB's jurisdiction over rail transportation activities and operations—as both the district court and the court of appeals found. Every court to consider the applicability of a state permitting statute to rail transportation facilities within the STB's jurisdiction has concluded that the state permitting system is preempted by Section 10501(b). The cases that petitioners assert conflict with the decision below have instead involved a different, fact-bound question: whether specific activities undertaken by a railroad fell within the statutory definition of rail "transportation," and thus within the exclusive jurisdiction of the STB. That issue is distinct from whether a state may require a railroad to participate in a prior permitting scheme for rail transportation activities or facilities that unquestionably *do* fall within the STB's jurisdiction. Thus, these cases in no way conflict with the decision below, and there is no reason for this Court to grant review.

STATEMENT

A. The History Of Railroad Regulation.

1. Congress has extensively regulated the nation's railroad system for over a century. See *Pittsburgh & Lake Erie R.R. Co.* v. *Ry. Labor Executives Ass'n*, 491 U.S. 490, 510 (1989); *City of Auburn* v. *United States*, 154 F.3d 1025, 1029